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TWO THEORIES OF CONSIDERATION.

I. UNILATERAL CONTRACTS.

CONSIDERATION, according to the traditional definition, is either a detriment incurred by the promisee or a benefit received by the promisor in exchange for the promise. Professor Langdell has pointed out the irrelevancy of the notion of benefit to the promisor, and makes detriment to the promisee the universal test of consideration. The simplified definition has met with much favor. It is concise, and it preserves the historic connection between the modern simple contract and the ancient *assumpsit* in its primitive form of an action for damage to a promisee by a deceitful promisor. In one respect only does the definition leave anything to desire. What is to be understood by detriment?

The incurring of a detriment by the promisee involves of necessity a change of position on his part; there must be some act or some forbearance by him. But will every act or every forbearance be a detriment, or must the word be restricted to certain acts and forbearances? It is certainly a common opinion that the word is to be interpreted in the restricted sense and cannot properly include an act or forbearance already due from the promisee by reason of some pre-existing legal obligation. The inability of the writer to reconcile this opinion with the decided cases has led him to give to detriment its widest interpretation and to define con-

sideration as any act of forbearance or promise,¹ by one person given in exchange for the promise of another.

These two views may be tested by the consequences of their application to the following three classes of acts or forbearances: I. Forbearance to prosecute a groundless claim. II. Performance of a pre-existing contractual duty to a person other than the promisor. III. Performance of a pre-existing contractual duty to the promisor himself.²

Before discussing these cases, however, it is important to emphasize the fact that a promise, though given for an abundant consideration, may yet be unenforceable. This is true whether detriment be taken in the wider or the narrower sense of the word. An illustration will make this clear. An unscrupulous friend of the defendant in a criminal trial promises a juror a certain amount of money in consideration of his voting to the end for acquittal. The juror does so vote. Here we have a promise for what is unquestionably a detriment to the promisee. But obviously the juror has no legal remedy on his bargain. He will fail, however, not because he has given no consideration for the promise, but because public policy forbids the enforcement of so vicious a bargain. This distinction is brought out pointedly in several cases where the act forming the consideration for the promise was a tort. The promisee in these cases was a sheriff who, acting upon a creditor's promise of indemnity, seized goods which he had no right to seize. In all of them he was made to pay damages to the person injured, and in all of them, having acted in good faith, he was allowed to recover on the contract of indemnity.³ Had

¹ A promise is an act; but to prevent possible misapprehension it seems expedient to add the word "promise" in the definition.

² A subsequent paper will deal with the Nature of Consideration in Mutual Promises.

³ *Arundel v. Gardiner*, Cro. Jac. 652; *Elliston v. Berryman*, 15 Q. B. 205; *Robertson v. Broadfoot*, 11 Up. Can. Q. B. 407. In *Fletcher v. Harcot*, Winch, 48, Hutt. 55 s. c., an innkeeper, at the request of an officer and upon the latter's promise of indemnity, kept in custody at his inn for a day and a night a man whom the officer had arrested. It turned out that the prisoner had been wrongfully taken by the officer, and the innkeeper, having been compelled to pay damages for the false imprisonment in his inn, recovered judgment against the officer on his promise, because, as Hobart, C. J., and Hutton and Winch, JJ., said: "Be the imprisonment lawful or unlawful, he (the innkeeper) might not take notice of that. As if I request another man to enter into another man's ground and in my name to drive out the beasts and impound them and promise to save him harmless, this is a good assumpsit, and yet the act is tortious; but by Hutton, where the act appears in itself to be unlawful, there it is otherwise, as if I request you to beat another and promise to save you harmless, this assumpsit is not good, for the act appears in itself to be unlawful."

he known that he was committing a tort, he would unquestionably have failed to get reimbursement from the creditor. The consideration, however, would have been precisely the same in both cases. But the public policy was on his side in the one case and would be against him in the other.

As public policy may destroy the value of a contract where the consideration is an act, so it may have the same effect where the consideration is a forbearance. One, who is induced to refrain from a contemplated murder or other crime by the promise of money, renounces his freedom of action and gives the promisor precisely what he wanted in return for his promise. There is, therefore, a bargain. But it is obviously against the public good to permit one to obtain a right of action solely as a reward for abstaining from the commission of a crime. The same reasoning is applicable to cases where the promisee is induced to refrain from grossly immoral though not criminal acts, or where he forbears, in return for a promise, to commit what he knows to be a tort.¹ In all these cases of forbearance just mentioned, those who interpret detriment in the restricted sense would say that the forbearance was legally due from the promisee independently of the promise, and that the promisee must fail because there was no consideration for the promise. But inasmuch as the same result is reached whether it be said that the forbearance is no consideration, or that the forbearance is a consideration but the bargain inoperative on grounds of public policy, we need not consider these cases further, but pass at once to those instances where the decision must vary accordingly as one or the other of the two theories of detriment is adopted.

I. Forbearance to prosecute a groundless claim.

A line of decisions² extending over nearly three centuries seemed to have established firmly in our law the doctrine that forbearance to sue upon an unfounded claim would never support

¹ *Cowper v. Green*, 7 M. & W. 633; *McCaleb v. Price*, 12 Ala. 753; *Worthen v. Thompson*, 54 Ark. 151; *Bruton v. Wooton*, 15 Ga. 570; *Smith v. Bruff*, 75 Ind. 412; *Botkin v. Livingston*, 21 Kas. 232; *Wendover v. Pratt*, 121 Mo. 273; *Swaggard v. Hancock*, 25 Mo. App. 596; *Crosby v. Wood*, 6 N. Y. 369; *Tolhurst v. Powers*, 133 N. Y. 460; *Cleveland v. Lenze*, 27 Oh. St. 383. But see *contra* *Pool v. Clipson, Shepp. Faithful Counsellor*, (2 Ed.) 131.

² *Lord Gray's Case* (1566), 1 Roll. Ab. 28, pl. 57; *Stone v. Wythipool* (1588), Cro. El. 126; *Tooley v. Windham* (1590), Cro. El. 206; *Smith v. Jones* (1610), Yelv. 184; *Rosyer v. Langdale* (1650), Sty. 248; *Hunt v. Swain* (1665), T. Ray. 127; *Barber v. Fox* (1670), 2 Wms. Saund. 136; *Loyd v. Lee* (1718), 1 Stra. 94; *Jones v. Ashburnham* (1804), 4 East, 455; *Edwards v. Baugh* (1843), 11 M. & W. 641.

a promise given therefor; that the promisee's belief in the validity of his claim as well as the fact that the claim was fairly doubtful in law or fact were alike irrelevant circumstances. There is surely no objection on the score of public policy to the enforcement of a promise obtained by a promisee in return for his forbearance to sue upon a fairly doubtful or a *bona fide* claim. It follows, therefore, that the line of decisions just mentioned can be supported only on the theory that forbearance to prosecute an invalid claim is not a detriment. And the cases were in fact decided upon this principle. This view is clearly stated by Tindal, C. J., in *Wade v. Simeon*:¹ "Detrimental to the plaintiff it [forbearance] cannot be if he has no cause of action; and beneficial to the defendant it cannot be, for, in contemplation of law, the defence upon such an admitted state of facts, must be successful, and the defendant will recover costs; which must be assumed to be a full compensation for all legal damage he may sustain."

But this seemingly inveterate doctrine has been overruled. Since the case of *Longridge v. Dorville*,² decided in 1821, it has been generally agreed that forbearance to enforce a claim that might reasonably be thought doubtful will support a promise, although the claim be really invalid.³ In *Callisher v. Bischoffsheim*,⁴ it was decided in accordance with opinions expressed in *Cook v. Wright*,⁵ that a promise in consideration of forbearance of an invalid claim was binding unless the claim was made *mala fide*. This decision, though criticised by Brett, L. J., in *Ex parte Banner*,⁶ has been approved and followed in subsequent cases.⁷ The late English cases have been cited with approval in several recent American cases.⁸ The modern English rule accords so well with the views of business men, that it can hardly fail of general adoption in this country.⁹

¹ 2 C. B. 548, 564. See the similar statement by Maule, J., page 566.

² 5 B. & Ald. 117.

³ *Keenan v. Handley*, 2 D. J. & S. 283; *Wilby v. Elgee*, L. R. 10 C. P. 497. Many American decisions to the same effect are cited in Professor Williston's note to 1 Pars. Cont. (8 Ed.) 458.

⁴ L. R. 5 Q. B. 449.

⁵ 1 B. & S. 559.

⁶ 17 Ch. D. 480, 490.

⁷ *Ockford v. Barelli*, 25 L. T. Rep. 504; *Kingsford v. Oxenden*, 7 Times L. R. 13, 565 (C. A.); *Miles v. New Zealand Co.*, 32 Ch. Div. 266.

⁸ *Prout v. Pittsfield District*, 154 Mass. 450; *Grandin v. Grandin*, 49 N. Y. 508; *Wahl v. Barnum*, 116 N. Y. 87; *Hewett v. Currier*, 63 Wis. 386.

⁹ The following cases in addition to those already cited, support the doctrine of *Callisher v. Bischoffsheim*. *Union Bank v. Geary*, 5 Pet. 99; *Morris v. Munroe*, 30 Ga.

In the light of this change in the law it can no longer be maintained that forbearance to prosecute a groundless claim is not a detriment. And as the validity of a promise given for such forbearance depends upon the good faith of the promisee, that is upon public policy, the forbearance cases support the writer's view that consideration is any act or forbearance by one person given in exchange for the promise of another.

II. Performance of a pre-existing contractual¹ duty to a person other than the promisor.

As early as 1616 it was decided in *Bagge v. Slade*,² that an action would lie upon a promise, the only consideration for which was the performance of a prior contract with a third person.

A bond executed by a principal and by A and B as sureties being forfeited, B requested A to pay the whole debt to the obligee promising to pay him a moiety. A paid accordingly and brought *Assumpsit* against B for refusing to keep his promise. It was objected that there was no consideration for the promise, since A was already bound to the obligee for the full amount of the bond. But the court gave judgment for A, Coke, C. J., saying: "I have never seen it otherwise but when one draws money from another, that this should be a good consideration to raise a promise. In considering this case it should be remembered that in the absence of an express contract there was at this time no right of contribution for a surety either at law or in equity."³ *Moore v. Bray*⁴ was

630; *Hayes v. Mass. Co.*, 125 Ill. 626, 639; *Ostrander v. Scott*, 161 Ill. 339; *Leeson v. Anderson*, 99 Mich. 247, 248; *Hanson v. Garr*, 63 Minn. 94. There are a few recent decisions to the contrary; *Sweitzer v. Heasley*, 13 Indiana Ap. 567; *Peterson v. Breitag*, 88 Iowa, 418, 422, 423; *Emmitsburg v. Donoghue*, 67 Md. 383. Other earlier decisions will be found in 1 Pars. Cont. (8 Ed.) 458 n.

¹ Promises given in consideration of the performance of official duties, or duties to the public, are not enforceable. Public policy, rather than the absence of consideration, it is submitted, is the sound reason for denying a right of action on such promises. But, the result being the same on either view, they fall without the scope of this article. The authorities are well collected in the note to 1 Parsons, Cont. (8th ed.) 452. See also *Willis v. Peckham*, 1 Br. & B. 515 (duty of witness to attend court); *Crowhurst v. Laverack*, 8 Ex. 208 (duty of mother to support illegitimate child); *Keith v. Miles*, 39 Miss. 442 (duty of ward to obey guardian), and especially *Leake*, Cont. (2d ed.) 99.

² 3 Bulst. 162, 1 Roll. R. 354, s. c.

³ In *Wormleighton v. Hunter* (1613), Godb. 243, a surety having exhibited an English Bill in the Court of Requests praying for contribution, the Common Pleas granted a prohibition, saying: "If one surety should have contribution against the other, it would be a great cause of suits."

⁴ 1 Vin. Ab. 310, pl. 31; but see *Westbie v. Cockayne* (1631), 1 Vin. Ab. 312, pl. 36, *contra*.

a similar case, decided in the same way, in 1633. An anonymous case of 1631 is thus reported in Sheppard's Action on the Case:¹ "If A owe to B twenty pounds and C say to A pay him his twenty pounds and I will pay it to you again, this is a good consideration and promise. Adjudged."

These early precedents seem to have been forgotten. But the question involved in them arose in the Common Pleas in 1860, in the Exchequer in 1861, and in the Queen's Bench in 1866; and in all three cases the plaintiff was successful.² One may safely assert, therefore, that by the law of England the performance of a contract with a third party is a consideration for a promise. It is obviously impossible to reconcile this rule of law with the restricted interpretation of detriment as an act or forbearance other than the fulfilment of a legal duty.³ But here again all difficulty disappears if we take detriment in the wider sense of any change of position, that is, any act or forbearance given in exchange for a promise.

It must be conceded that in this country a majority of the decisions and *dicta* are opposed to the doctrine of *Shadwell v. Shadwell*, *Scotson v. Pegg*, and *Chichester v. Cobb*.⁴ But in most of them the English cases were not brought to the attention of the court. And it is certainly a significant fact that the latest decisions show a marked tendency towards the English rule.⁵ The decision of the Massachusetts court is all the more valuable because given in the light of the authorities on both sides of the question. It would

¹ (2d ed.) 155-156.

² *Shadwell v. Shadwell*, 9 C. B. N. s. 159; *Scotson v. Pegg*, 6 H. & N. 295; *Chichester v. Cobb*, 14 L. T. Rep. 433. See also *Skeete v. Silverburg*, 11 Times L. R. 491. But see *dicta* to the contrary in *Jones v. Waite*, 5 Bing. N. C. 541.

³ The cases on this point have proved very troublesome to text-writers. Anson, Cont. (8 ed.) 91, 92; Pollock, Cont. (6 ed.) 175-177; Langdell, Summary of Cont. § 54.

⁴ *Johnson v. Seller*, 33 Ala. 265 (*semble*); *Havana Co. v. Ashurst*, 148 Ill. 115, 136 (*semble*); *Peetman v. Peetman*, 4 Ind. 612; *Ford v. Garner*, 15 Ind. 298; *Reynolds v. Nugent*, 25 Ind. 328; *Ritenour v. Andrews*, 42 Ind. 7; *Harris v. Cassady*, 107 Ind. 156; *Beaver v. Fulp*, 136 Ind. 595; *Schuler v. Myton*, 48 Kan. 282; *Putnam v. Woodberry*, 68 Me. 58; *Gordon v. Gordon*, 56 N. H. 170, 173 (*semble*); *Ecker v. McAllister*, 45 Md. 290; 54 Md. 362, s. c.; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Robinson v. Jewett*, 116 N. Y. 40; *Arend v. Smith*, 151 N. Y. 502; *Allen v. Turck*, 8 N. Y. App. Div. 50; *Hanks v. Barron*, 95 Tenn. 275; *Davenport v. Congregational Society*, 33 Wis. 387.

⁵ *Humes v. Decatur Co.*, 98 Ala. 461, 473 (*semble*); *Abbott v. Doane*, 163 Mass. 433; *Munnahan v. Judd*, 165 Mass. 93, 100 (*semble*); *Wilhelm v. Foss* (Michigan, 1898), 76 N. W. Rep. 308 (*semble*); *Day v. Gardner*, 42 N. J. Eq. 199, 203 (*semble*); *Green v. Kelley*, 64 Vt. 309; see also *Grant v. Duluth Co.*, 61 Minn. 395, 398.

not be surprising, if ultimately a considerable majority of the American courts, not already fettered by their own precedents, should adopt the English and Massachusetts rule, which has the great merit of not hampering, by a technicality, freedom of contract.

III. Performance of a pre-existing contractual duty to the promisor himself.

The question, whether a promise is enforceable where the promisor gets for it only what the promisee was already bound by contract to give him, has generally arisen in cases where a part of the amount due has been given and received in satisfaction of a debt. The ruling of the courts is well-nigh universal that, notwithstanding the partial payment upon such terms, the creditor may recover the rest of the debt. As the rule is commonly expressed, the payment of a part of a debt cannot be a satisfaction of the whole. And the rule is commonly thought to be a corollary of the doctrine of consideration. But this is a total misconception. The rule is older than the doctrine of consideration and is simply the survival of a bit of formal logic of the mediæval lawyers.

The earliest allusion to the effect of a partial payment in satisfaction of a debt that the writer has found is the remark of Danvers, J., in 1455;¹ and he, strange to say, thought the part payment should be effective: "Where one has *quid pro quo*, there it shall be adjudged a satisfaction. As if one be indebted to me in 40 pounds and I take from him 12d. in satisfaction of the 40 pounds, in this case I shall be barred of the remainder." Forty years later,² Fineux, J., expressed a similar opinion. "I think there is no difference between accord and satisfaction in money and in a horse. For notwithstanding the sum is less than that in demand, still when the creditor has received it by his own agreement it is as good a satisfaction to him as anything else." But Brian, C. J., said in the same case: "The action is brought for 20 pounds and the concord is that he shall pay only 10 pounds which appears to be no satisfaction for 20 pounds. For payment of 10 pounds cannot be payment of 20 pounds. But if it were a horse, which horse is paid according to the concord, that is a good satisfaction; for it does not appear whether the horse is worth more or less than the sum in demand. And notwithstanding the horse may be worth only a penny, that is not material, for it is not apparent." Perkins in his *Profitable Book*,³ first published in 1532, agreed with Danvers and

¹ Y. B. 33 Hen. VI. f. 48, A. pl. 32.

² Y. B. 10 Hen. VII., f. 4, pl. 4.

³ F. 141 of edition of 1545; § 749 of edition of 1757.

Fineux: "If a man be bounden in 100 pounds to pay 100 marks unto the obligee, and the obligee accept of 10 pounds of the obligor in satisfaction of 100 marks, it is a good performance of the condition; and yet some have said the contrary, because 10 pounds cannot be satisfaction of 100 marks. But that is not material in his case because the obligee is content therewith." But this protest was powerless against the logic of Brian. In 1561 all the judges agreed that "the payment of 20 pounds cannot be a satisfaction for 100 pounds."¹ In 1602 came Coke's celebrated dictum in *Pinnel's case*:² "Resolved by the whole Court that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, or robe, etc., in satisfaction is good. For it shall be intended that a horse, hawk, or robe might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of a parcel can be a satisfaction to the plaintiff."³ The same reasoning occurs in the *Commentary on Littleton*:⁴ "because it is apparent that a lesser sum of money cannot be a satisfaction of a greater."

As the learned reader will have observed, there is no allusion in any of these remarks of the judges to the consideration for an *assumpsit*. The word consideration, in its modern sense, was unknown to Brian, and the action of *assumpsit* itself was, in his day, in the embryonic stage. To his mind, whether 10 pounds could be a satisfaction of 20 pounds was a question of simple arithmetic which admitted of only one answer. Ten cannot be twenty, the part cannot be the whole. Coke was presumably familiar with Brian's statement. At all events he reasoned in precisely the same axiomatic way: "It appears to the judges that by no possibility a lesser sum can be a satisfaction for a greater." It is sufficiently obvious from the similarity of the language of Coke and Brian that it never occurred to the former that the resolution in *Pinnel's*

¹ Note, Dal. 49, pl. 13. To the same effect *Anon.* (1588) 4 Leon. 81, pl. 172, "*Per curiam*, 5 pounds cannot be a satisfaction for 10 pounds."

² 5 Rep. 117, a; *Moo.* 677, pl. 923, s. c.

³ In the report of the same case in *Moore* it is said: "But payment of part at the day and place cannot be, though accepted, satisfaction of the whole of the same kind." See also *Goring v. Goring*, (1602) *Yelv.* 11.

⁴ 212, b.

case was based upon any doctrine of consideration. But, fortunately, Coke's opinion is not a mere matter of inference. We have his own explicit statement, discriminating in the sharpest way between the operation of part payment as a satisfaction and as a consideration. In *Bagge v. Slade*¹ he said: "If a man be bound to another by a bill in 1000 pounds and he pays unto him 500 pounds in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of 1000 pounds, this 500 pounds is no satisfaction of the 1000 pounds, but yet this is good and sufficient to make a good promise and upon a good consideration because he has paid money, 500 pounds, and he hath no remedy for this again." In 1639 the obligor recovered judgment upon a promise like that in the case put by Coke, the Court saying: "For though legally, after the obligation is forfeited, 30 pounds can be no satisfaction for 60 pounds, yet to have the money in his hands without suit is a good consideration to maintain this action upon the promise."² There are several other cases where payment of part of what was due was adjudged a sufficient consideration to support a promise to deliver up the obligation.³ There are also cases in which payment of the whole was deemed a consideration for a similar promise.⁴ In *Morris v. Badger*⁵ it was decided, in 1621, that payment by a surety would support a promise by the creditor to sue the principal and hold the amount recovered for the benefit of the surety. In *Hubbard v. Farrer*,⁶ decided in 1635, a promise by an

¹ 3 Bulst. 162, 1 Roll. R. 354, Jenk. Cent. Cas. 324, pl. 38, Harv. Ms. R. temp. 14 James I., 2, s. c.

² Rawlins v. Lockey, (1639) 1 Vin. Ab. 308, pl. 24.

³ Reynolds v. Pinhowe, (1595) Cro. El. 429, 1 Roll. Ab. 28, pl. 54, Moo. 412, s. c.: "Because speedy payment excuses and prevents labour and expense of suit;" Anon., (1598) 1 Roll. Ab. 27, pl. 53, per Popham, C. J. Johnson v. Astill, (1667) 1 Lev. 198, 2 Keb. 155 s. c.: "By the Court. Payment without suit or trouble of that which is due is a good consideration." See also the opinion of Littledale, J., to the same effect in Wilkinson v. Byers, 1 A. & E. 106.

⁴ Cook v. Huet, (1581) 1 Leon. 238, pl. 317 (cited), Cro. El. 194 (cited) s. c.; Anon., Hutt. 101 (cited); Flight v. Crasden, (1625) Cro. Car. 8, Hutt. 76, s. c.: "It is consideration sufficient to have it paid without suit or trouble." Anon., (1675) 1 Vent. 1675: "Payment of a debt without suit is a good consideration."

Dixon v. Adams, (1596) Cro. El. 538, Moo. 710 s. c. is *contra*, but, so far as the writer has discovered, is the only reported English decision in which the plaintiff failed in an action upon a promise given in consideration of the payment of money due. There are dicta to the same effect in Richards v. Bartlett, (1582) 1 Leon. 19; Greenleaf v. Barker, (1596) Cro. El. 193.

⁵ Palm. 168, Harv. Ms. Rep. temp. 2-22 James I., f. 181, pl. 6, s. c.

⁶ 1 Vin. Ab. 306, pl. 17.

obligee, in consideration of payment of less than the amount due by the principal obligor, not to sue the surety, was held to be a valid contract, "for it is a good consideration for the obligee to have money in his purse, it being before only a chose in action."

The subsequent history of the mediæval doctrine, that a partial payment of a debt cannot be a satisfaction of the whole amount due, although so intended by the parties, is soon told. In *Cumber v. Wane*,¹ in 1721, the defendant pleaded to an action of indebitatus assumpsit that his own negotiable note for five pounds had been given and received in satisfaction of the debt. The plaintiff objected that the plea was ill, "it appearing that the note for 5 pounds could not be a satisfaction for 15 pounds. . . . Even the actual payment of 5 pounds would not do, because it is a less sum. Much less shall a note payable at a future day." This argument prevailed. Pratt, C. J., said: "We are all of opinion that the plea is not good. . . . If 5 pounds be (as is admitted) no satisfaction for 15 pounds, why is a simple contract to pay 5 pounds a satisfaction for another simple contract for three times the value." The next judicial allusion to the doctrine appears to be a *dictum* of Buller, J., in 1798: "Whether an agreement by parol to accept a smaller sum in satisfaction of a larger can be pleaded or not I do not know. It was formerly considered that it could not, and was so decided in Coke. I think, however, there are some late cases to the contrary, and one in particular in Lord Mansfield's time, who said that, if a party chose to take a smaller sum, why should he not do it? There may be circumstances under which such an agreement might not only be fair, but advantageous."² But this *dictum* has had no effect. Six years later the old rule was reasserted in *Fitch v. Sutton*.³ Lord Ellenborough, unaware of the true origin of the rule and unacquainted with *Bagge v. Slade* and the kindred cases of the seventeenth century, put forward the novel view that the rule was based upon the doctrine of consideration. "There must be some consideration for the relinquishment of the residue; something collateral, to shew a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*." This statement by

¹ Stra. 426. *Cumber v. Wane*, though clearly coming within the reasoning of Brian and Coke (see also *Geang v. Swaine*, 1 Lutw. 464, 466), and approved in *Fitch v. Sutton*, 5 East, 230, 232, and *Thomas v. Heathorn*, 2 B. & C. 477, 481, was overruled in *Sibree v. Tripp*, 15 M. & W. 22.

² *Stock v. Mawson*, 1 B. & P. 286, 290.

³ 5 East, 230.

Lord Ellenborough, false gloss though it be, has been generally followed by the courts, and is responsible for the greater part of the objectionable applications of the doctrine of consideration, whereby the reasonable expectations of business men have been disappointed.

But notwithstanding its general acceptance, this doctrine of Lord Ellenborough has met with almost unparalleled animadversion at the hands of the judges who have applied it.¹

The law has been changed by statute in India,² and in at least ten of our States.³ In one State, Mississippi, the rule was abolished by the Court without the aid of a statute.⁴ There are also limitations to the rule, which emphasize its artificiality. It is common

¹ A creditor "might take a horse or a canary or a tomtit, if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. . . . That was one of the mysteries of the English Common Law." Per Jessel, M. R., in *Couldery v. Bartrum*, 19 Ch. D. 394, 399. "This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import." Per Dewey, J., in *Brooks v. White*, 2 Met. 283, 285. "The rule is technical and not very well supported by reason." Per Nelson, J., in 14 Wend. 116, 119. "The rule is evidently distasteful to the courts, and they have always been anxious to escape it by nice distinctions." Per Curiam in *Smith v. Ballou*, 1 R. I. 496. "A doctrine utterly absurd, and standing, as it confessedly does, in humiliating contrast to the common sense of mankind." Per Munro, J., 11 Rich. 135, 139. "Several courts seem to have given assent to the rule with reluctance, and condemned the reasoning which supports it." Beck, C. J., in *Works v. Hershey*, 35 Iowa, 340, 342. "This rule being highly technical in its character, seemingly unjust, and often oppressive in its operation." Per Hinton, J., in *Symme v. Goodrich*, 80 Va. 303, 304. "The history of judicial decisions has shewn a constant effort to escape from its absurdity and injustice. . . . A moment's attention to the cases taken out of the rule will show that there is nothing of principle left in the rule itself." Per Ranney, J., in *Harper v. Graham*, 20 Ohio, 105, 115-118. "The courts, while so ruling, have rarely failed, upon any recurrence of the question, to criticise and condemn its reasonableness, justice, fairness, or honesty." Per Potter, J., in *Jaffray v. Davis*, 124 N. Y. 164, 167. Many similar criticisms might be added.

² Indian Contract Act, Sec. 63.

³ Ala. Code, Sec. 2774; Cal. Civ. Code, Sec. 1524; Dak. Comp. Laws, Sec. 3486; Ga. Code, Sec. 3735; Maine Rev. St., c. 82, Sec. 45; No. Car. Code, Sec. 574; N. Dak. Rev. Code, Sec. 3827; Hill, Ann. Laws of Oregon, Sec. 755; Tenn. Code, (1884) § 4539; Va. Code, (1897) § 2858.

⁴ *Clayton v. Clark*, 74 Miss. 499. See also to the same effect *Smith v. Wyatt*, 2 Cincin. Sup. Ct. 12. By decision, too, in some States, a parol debt may be satisfied if the creditor gives a receipt in full for a partial payment. *Green v. Langdon*, 28 Mich. 221; *Lamprey v. Lamprey*, 29 Minn. 151 (*semble*); *Gray v. Barton*, 55 N. Y. 68; *Ferry v. Stephens*, 66 N. Y. 321; *Carpenter v. Soule*, 88 N. Y. 251; *McKenzie v. Harrison*, 120 N. Y. 260. In others, partial payment is a satisfaction if the debtor is insolvent. *Westcott v. Waller*, 47 Ala. 492, 498 (*semble*); *Shelton v. Jackson*, (Tex. Civ. Appeals, 1899) 49 S. W. Rep. 414, or even if he is honestly believed to be insolvent. *Rice v. London Co.*, (Minnesota, 1897) 72 N. W. Rep. 826.

learning, for instance, that payment of the smallest sum the day before the debt matures, or at a different place, may be an accord and satisfaction of the largest debt. At the present day, too, *Cumber v. Wane* having been overruled,¹ the debtor's own promise to pay five pounds, if in the form of a negotiable note, may be a satisfaction of a debt of one thousand pounds. Again, an unliquidated claim, however large, may be settled by the payment of any amount, however small.

These limitations may be logically defensible. But the same cannot be said of the important class of cases, in which two or more creditors acting in concert compromise with their debtor upon payment of a percentage of their claims. The application of the modern doctrine, as stated by Lord Ellenborough, in these cases threatened a result so alarmingly at variance with the needs of business men, that the courts declined to apply the doctrine. Such compromises have been deemed valid since the case of *Good v. Cheeseman*.² The court professed to find a consideration for each creditor's promise to relinquish a part of his claim in the similar agreement of his fellow creditors. But it is obvious that in England, at least, the debtor could acquire no rights on a promise by virtue of a consideration that did not move from himself.³ The frank way of dealing with these cases is to say that they can be supported only upon Coke's view, that the payment of part of a debt is a good consideration for the creditor's promise to relinquish all claim to the rest.⁴ In his day, it is true, the only way in which

¹ *Sibree v. Tripp*, 15 M. & W. 22; *Goddard v. O'Brien*, 9 Q. B. Div. 37; *Wells v. Morrison*, 91 Ind. 51; *Jaffray v. Davis*, 124 N. Y. 164 (*semble*); *Mechanics' Bank v. Huston*, 11 W. N. (Pa.) 389; *Jaffray v. Crane*, 50 Wis. 349. But see *contra*, *Overdeer v. Wiley*, 30 Ala. 769; *Siddall v. Clark*, 89 Cal. 321; *Post v. First Bank*, 138 Ill. 539 (*semble*); *Jenness v. Lane*, 26 Me. 475; *Russ v. Hobbs*, 61 N. H. 93; *Hooker v. Hyde*, 61 Wis. 204.

² 2 B. & Ad. 328; *Boyd v. Hind*, 1 H. & N. 938; *Slater v. Jones*, L. R. 8 Ex. 186, 193. The rule is the same in this country. *Perkins v. Lockwood*, 100 Mass. 249, 250; *Bartlett v. Woodworth Co.* (N. H., 1898), 41 Atl. Rep. 264; *White v. Kuntz*, 107 N. Y. 518; *Continental Bank v. McGeoch*, 92 Wis. 286.

³ Professor Huffcut, in his edition of Anson's *Law of Contract*, 108, n. 1, makes an excellent criticism of the futile attempts that have been made to find in the cases of composition with creditors some other consideration than the partial payment of the debts due.

⁴ Lord Fitzgerald said in *Foakes v. Beer*, 9 App. Cas. 605, 630: "I concur with my noble and learned friend that it would have been wiser and better if the resolution in *Pinnel's* case had never been come to, and there had been no occasion for the long list of decisions supporting composition with a creditor on the rather artificial consideration of the mutual consent of the creditors."

the debtor could make use of such a promise was by a cross action. But in recent times such a promise would serve as a bar to an action upon the partially paid debt, on the ground of avoiding circuity of action, since what the creditor recovered in his action against the debtor, he would have to repay as damages in the cross action.

By this simple process, without any impeachment of the logic of *Brian*, or of the resolution in *Pinnel's* case, the mediæval rule that there cannot be an accord and satisfaction of a debt by a payment of part of it, would have ceased to have any practical operation; full effect would have been given to reasonable bargains of business men; and the law of consideration would have gained greatly in simplicity and freedom from annoying technicalities.

In 1882 the House of Lords were in a position to bring about this greatly to be desired result. In *Foakes v. Beer*,¹ a creditor, in consideration of the payment of the principal of the debt undertook to relinquish all claim to interest. The Lords with great reluctance, Lord Blackburn all but dissenting, gave judgment for the plaintiff, and chiefly for the reason that they were not prepared to overrule, as contrary to law, the doctrine stated by Coke in *Pinnel's* case. It is greatly to be deplored that the case of *Bagge v. Slade*, and the other similar cases, were not brought to the attention of the court. Had Coke's real opinion, as expressed in that case, been made known to the Lords, it is not improbable that they would have followed it, instead of making him stand sponsor for a doctrine contrary to his declared convictions.

Wherever a promise to relinquish a debt given in consideration of its partial payment is inoperative, a promise of temporary forbearance for the same consideration must be invalid. But no English case to this effect has been found. There are, however, numerous American decisions on the point.²

If a promise by a creditor in consideration of the payment of a part or the whole of a debt is not enforceable, it follows that a promise in consideration of the performance of any other act due

¹ 9 App. Cas. 605.

² *Liening v. Gould*, 13 Cal. 598; *Solary v. Stultz*, 22 Fla. 263; *Holliday v. Poole*, 77 Ga. 159; *Bush v. Rawlins*, 89 Ga. 117; *Phoenix Co. v. Rink*, 110 Ill. 538; *Shook v. State*, 6 Ind. 461; *Dare v. Hall*, 70 Ind. 545; *Davis v. Stout*, 84 Ind. 12; *Potter v. Green*, 6 All. 442; *Warren v. Hodge*, 121 Mass. 106; *Kern v. Andrews*, 59 Miss. 39; *Price v. Cannon*, 3 Mo. 453; *Tucker v. Bartle*, 85 Mo. 114; *Russ v. Hobbs*, 61 N. H. 93; *Parmalee v. Thompson*, 45 N. Y. 58; *Turnbull v. Brock*, 31 Oh. St. 649; *Yeary v. Smith*, 45 Tex. 56, 72.

by contract to the promisor should be deemed invalid. But there is a singular dearth of cases in the English courts. The only cases found by the writer are those in which actions were brought by seamen on promises of extra compensation in consideration of their doing their duty during a storm, or after the desertion of some of the crew.¹ The seamen were unsuccessful in these cases, and rightly so on the ground of public policy. But in some of the cases the court gave the additional reason that the promise was without consideration.

In this country there are numerous cases in which, after the making of a bilateral contract, by which one party was to perform certain work or deliver certain merchandise, and the other was to pay a certain price therefor, one of the parties finding his bargain a losing one threatened to abandon it, whereupon the other party promised him something additional to induce him to continue. If at the time of the new promise the original contract remained to some extent executory on both sides, the new arrangement might conceivably assume different forms. Suppose, for instance, a building contract under seal, and the builder to be dissatisfied and to break his contract; the parties might mutually agree the one to go on with his work, the other to pay extra compensation. It is unreasonable to suppose that either party understood that the builder was to continue liable to an action for his breach of the original contract, or that the builder in case of non-payment would have to resort to two actions, — one upon the old contract for the original price, and one upon the new contract for the *bonus*. In other words, the parties contemplated a substitution of a new contract in place of the old one. The new contract, stated in terms of consideration, would be as follows: "In consideration that the builder promises to complete the job and to abandon all claim against the employer on the old contract, the employer promises to pay the builder the old price plus an additional amount, and to abandon his claim against the builder on the old contract." This would be a case of rescission, and the builder's right of recovery would be clear on either of the two theories of consideration under discussion in this paper.²

¹ Harris v. Watson, Peake, 72; Stilk v. Myrick, 6 Esp. 129, 2 Camp. 317 S. C.; Fraser v. Hutton, 2 C. B. (N. S.) 912; Harris v. Carter, 3 E. & B. 559; Scotson v. Pegg, 6 H. & N. 295, per Martin, B. See also Bartlett v. Wyman, 14 Johns. 260.

² The following cases, in which the plaintiff recovered on the new contract, appear to have been rightly decided; Stoudermeir v. Williamson, 29 Ala. 558; Connelly v.

Again, in the case above supposed, the employer might promise to pay the extra compensation, and the builder might complete the job, but without giving any new promise to do so. This arrangement would probably mean a substitution of a new contract for the old one. "In consideration of the builder's promise to abandon all claim against the employer on the old contract, the employer promises to abandon all claim on the old contract, and to pay the old price plus the additional amount, provided the builder completes the job." This would also be a case of rescission, and the builder would be entitled to sue on the new contract on any theory of consideration.¹

On the other hand, one of the parties to the original contract may have performed everything on his side, and the other party then refuse to do his part. If, under these circumstances, the one who has performed his part promises something extra for the other's performance, there can be no question of rescission. The case is the same in principle as the promise of a creditor in consid-

Devoe, 37 Conn. 570; Bishop v. Busse, 69 Ill. 403; Cooke v. Murphy, 70 Ill. 96; Coyner v. Lynde, 10 Ind. 282; Courtenay v. Fuller, 65 Me. 156; Munroe v. Perkins, 9 Pick. 298; Holmes v. Doane, 9 Cush. 135; Rollins v. Marsh, 128 Mass. 116; Rogers v. Rogers, 139 Mass. 440; Thomas v. Barnes, 156 Mass. 581; Goebel v. Linn, 47 Mich. 489; Conkling v. Tuttle, 52 Mich. 630; Osborne v. O'Reilly, 42 N. J. Eq. 467; Lattimore v. Harsen, 14 Johns. 440; Stewart v. Keteltas, 36 N. Y. 388; Nesbitt v. R. R. Co., 2 Speers, 697, 706 (*semble*).

The plaintiff failed in Ayres v. Chicago Co., 52 Iowa, 478; McCarty v. Hampden Association, 61 Iowa, 287; King v. Duluth Co., 61 Minn. 482; Lingenfelder v. Wainwright Co., 103 Mo. 578. But the question of rescission was not adequately considered.

In King v. Duluth Co., *supra*, the court made a distinction not elsewhere suggested. The validity of the new agreement was made to turn upon the circumstances under which the losing party declined to go on. If he declined simply because he had made an unfortunate bargain, the new agreement was said to be inoperative for want of a consideration. But if he declined because of difficulties that could not reasonably have been foreseen, the new agreement would be a valid substitution for the old contract. The consideration is obviously the same in both cases. In truth, the court, in suggesting this distinction, abandoned their professed doctrine of consideration, and introduced the test of public policy. Furthermore, in defining this test, the court was unduly severe upon the plaintiff. Surely it cannot be against the public good to permit the parties to rescind the old contract and to make a new one for greater compensation to one of the parties, when the latter has made an unfortunate bargain which he honestly prefers to abandon, whatever be the consequences. On the other hand, it may well be maintained, on grounds of policy, that one who refuses to keep his contract simply in order to exploit the necessities of the other party, should not be permitted to enforce a new agreement for extra compensation obtained in a manner savoring so strongly of extortion.

¹ Moore v. Detroit Works, 14 Mich. 266; Lawrence v. Davey, 28 Vt. 264. But the right of the plaintiff to recover was denied in Festerman v. Parker, 10 Ired. 474.

eration of payment of the debt due to him. Only three reported cases presenting such a state of facts have been found, *Peck v. Requa*,¹ *Gaar v. Green*,² and *Schneider v. Heinsheimer*.³ In the first of these cases the plaintiff refused to fulfil his contract with the defendant to resign a certain office on request, and the defendant, to induce him to keep his promise, gave him his promissory note. It was urged, but unsuccessfully, that there was no consideration for the note. In the second case, the buyer of a machine, for which, if kept more than six days, he was to give a note and mortgage, declined, after the six days, to keep his promise. The seller, in order to obtain the note and mortgage, then warranted the quality of the machine. The court decided that the warranty was not binding. The agreement was adjudged invalid in the third case also.

To the writer the decision in *Peck v. Requa* seems sound, but the language of the court is certainly surprising in a jurisdiction in which the doctrine of *Foakes v. Beer* is maintained: "Previously he had only the plaintiff's agreement to resign. By the new contract he obtained from the plaintiff his actual resignation, and in consideration thereof he gave the note in suit. By the surrender of an office which he had a right⁴ to retain, the plaintiff suffered a detriment, and the defendant thereby gained an advantage which furnished a valid consideration for the note." It is evident from the paucity of such cases that the question, whether the performance of a pre-existing contractual duty to the promisor will support a promise, seldom arises, except in the case of a promise in consideration of the payment of part or the whole of a debt.

The examination of our three classes of cases, of which *Callisher v. Bischoffsheim*, *Shadwell v. Shadwell*, and *Foakes v. Beer* are the conspicuous illustrations, makes it clear that the authorities cannot be reconciled with any theory of consideration. We must either adopt the view that consideration is an act or forbearance not already due from the promisee, and treat the first two classes of cases as exceptions, indefensible on principle, but established as law in England, and either already representing, or likely to represent, the predominant judicial opinion in this country, or else we must adopt the other view, that consideration is any act or forbearance by the promisee, and regard the third class of cases, of which

¹ 13 Gray, 407.

² 6 N. Dak. 48.

³ 55 N. Y. Sup. 630.

⁴ This must mean simply that he could not be ejected from the office.

Foakes v. Beer is the type, as an exception contrary to principle, but sanctioned by the highest judicial authority in England and the United States.

Bearing in mind that the decisions in *Callisher v. Bischoffsheim* and *Shadwell v. Shadwell* accord with the sentiments of business men, and that it is in the highest degree improbable that the doctrine of those cases will ever be reversed by the court or overthrown by statutes in the jurisdictions in which it has once been adopted; and remembering, on the other hand, that the doctrine of *Foakes v. Beer*, originated in misconception, is repugnant alike to judges and men of business, is not applied consistently to all the cases fairly within its scope, has been a source of highly artificial and technical distinctions, has been changed by statute in India and in ten of our States, and is likely to be generally superseded by similar legislation, the writer does not hesitate to choose the second of the above alternatives, and to define consideration as "any act or forbearance given in exchange for a promise," with this qualification, however, that, for the present, by an unfortunate but established anomaly, a creditor's promise in consideration of the payment of the whole or a part of the debt by his debtor is invalid. This definition unquestionably makes for individual freedom of contract and for logical simplicity in the law. It is believed, also, to be a just deduction from the decided cases.

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